Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, CNR, MNR, MNDC, MNSD, FF, O

Introduction
This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) of February 6, 2015, pursuant to section 46;
- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) of February 13, 2015, pursuant to section 49;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement and for emergency repairs pursuant to section 67;
- authorization to obtain a return of all or a portion of their security and pet damage deposits pursuant to section 38;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72; and
- other unspecified remedies.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. At the outset of the hearing, both parties were advised that a Residential Tenancy Branch (RTB) staff member would be listening to the proceedings for the purposes of training. This staff member did not participate in this hearing.

The landlord confirmed that she has no active applications for dispute resolution before the RTB for this tenancy. She made an oral request for the issuance of an Order of Possession in the event that the tenants' applications to cancel the two notices to end tenancy were dismissed.

At the commencement of this hearing, I noted that there have been a long series of arbitration decisions issued with respect to this tenancy. I advised the parties that it appeared that much if not all of the tenants' current monetary claim for $10,086.98 has been addressed in interim decisions and decisions issued by other arbitrators on January 3, 2014, August 13, 2014, January 7, 2015, February 11, 2015 and most recently February 13, 2015. A number of the above decisions made determinations that the arbitrators were unable to consider the claims submitted by the tenants because of the legal principle of *res judicata*, meaning that decisions had already been made by previous arbitrators on these issues. It would also appear that most if not all of the tenants' current monetary claim would similarly be subject to this legal principle.

Rule 2.3 of the Residential Tenancy Branch's (the RTB's) Rules of Procedure allows an arbitrator the discretion to dismiss unrelated claims with or without leave to reapply after assessing the extent to which the applications are related to one another. Most of the tenants' claim for a monetary award pre-dates

the February 13, 2015 decision. That decision allowed a rent reduction as of March 2015, but dismissed the tenants' application for a monetary award of $9,400.00 for their loss of use of the premises. The arbitrator who made the February 13, 2015 decision also noted that a previous arbitrator's decision of August 13, 2014 had also dismissed the tenants' application for loss of use and loss of quiet enjoyment.

Given the complexity of the claims, I have decided that the two portions of the current application of the highest priority were the tenants' applications to cancel the two notices to end tenancy of February 6 and 13, 2015. Without making any finding as to whether any portion of the tenants' claims for a monetary award are properly before me, I exercise my discretion pursuant to Rule 2.3 of the Rules of Procedure to consider only the tenants' applications to cancel the two notices to end tenancy and their application to recover the filing fee for the current application. The tenants remain at liberty to submit a new and separate application for a monetary award, keeping in mind that final and binding decisions made by previous arbitrators for monetary awards cannot be altered or overturned by submitting new applications for issues already decided.

Preliminary Issues –Service of Documents

At the commencement of the hearing, the landlord testified that she posted the 10 Day Notice seeking unpaid rent owing as of January 15, 2015, on the tenants' door on February 4, 2015. The tenants confirmed that they received this 10 Day Notice. As this 10 Day Notice, entered into written evidence by the tenants, is clearly dated February 6, 2015, I find it more likely that the 10 Day Notice was posted on the tenants' door as of February 6, 2015. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were duly served with the landlord's 10 Day Notice.

The tenants confirmed that they received the landlord's 2 Month Notice posted on their door on February 13, 2015. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were duly served with the landlord's 10 Day Notice on February 13, 2015.

The landlord confirmed that she received a copy of the tenants' amended dispute resolution hearing package including the application for dispute resolution by way of registered mail on February 16, 2015. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the tenants' hearing package.

After initially scheduling this hearing as an in-person hearing, the hearing was subsequently rescheduled as a teleconference hearing. Both parties confirmed that they had received the revised notification of this method of hearing from the RTB.

The landlord confirmed that she had received copies of the tenants' written evidence package. The landlord testified that she provided the tenants with copies of her written evidence package. Although the tenants said that they had not received the landlord's entire written evidence package, they had received at least the first 26 pages of that package. The male tenant (the tenant) quoted from that package during his sworn oral testimony. As I had not been provided with copies of the landlord's written evidence, I asked the landlord to re-send this written evidence to the RTB by facsimile following the hearing. Although the landlord re-sent this evidence by facsimile later that afternoon, I was able to locate the landlord's written evidence package shortly after this hearing.

I have taken into consideration the first 26 pages of the landlord's written evidence and all of the 100 pages entered into written and photographic evidence by the tenants for this hearing. I also note that I

find very little of the written or photographic evidence provided by either party of relevance to the two notices to end tenancy before me.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Are the tenants entitled to recover their filing fee for this application from the landlord?

Background and Evidence

This tenancy commenced on February 15, 2012, initially as a one-year fixed term tenancy. The parties signed a subsequent one-year fixed term tenancy agreement covering the period from February 15, 2013 until February 14, 2014. Once the second fixed term tenancy expired, this converted to a month-to-month tenancy. Monthly rent for this two bedroom basement unit was initially set at $2,200.00, but has escalated to $2,350.00 at present, due on the 15th of each month. The landlord continues to hold the tenants' $1,100.00 security deposit and $1,100.00 pet damage deposit, both paid at the beginning of this tenancy. The landlord lives upstairs from the tenants.

The landlord issued a 10 Day Notice, dated February 6, 2015, for unpaid rent owing as of January 15, 2015. Both parties agreed that the tenants subsequently paid the $2,350.00 identified as owing in the 10 Day Notice. The tenants also applied for dispute resolution to cancel the 10 Day Notice on February 10, 2015. The tenants provided sworn testimony and written evidence to support their assertion that they paid the amount identified as owing on the 10 Day Notice, in full, within five days of receiving the landlord's 10 Day Notice. The landlord confirmed that she has accepted payments of $2,350.00 for rent owing as of January 15, 2015 and February 15, 2015, for "use and occupancy only" and not to reinstate this tenancy. The landlord could only recall that she received the tenants' payment for January 2015 rent in early February.

The landlord's 2 Month Notice, entered into written evidence by both parties, identified the following reason for seeking an end to this tenancy:

- *The rental unit will be occupied by the landlord…or a close family member (father, mother, or child) of the landlord…*

At the hearing, the landlord said that she is planning to move into the tenants' rental unit with her school-aged daughter. She said that she has encountered unexpected investment losses arising from her ownership of rental properties. The landlord stated that she needs to occupy the tenants' rental unit, so that she can rent her own main floor residence to other occupants at a higher monthly rent. . She said that she is experiencing cash flow problems and does not work. She gave undisputed sworn testimony that she expects to be able to obtain $5,000.00 to $6,000.00 per month from the rental of the main floor as opposed to the current $2,350.00 she obtains from the tenants in the rental unit. The landlord testified that her daughter's school is four minutes from her current location and that it is very important to her that she retains continuity for her daughter at this school. She confirmed the tenants' allegation that she has rental properties in two other municipalities. At one point in the hearing, she testified that she emptied both rental properties of tenants and attempted to sell them on the real estate market. The more distant property remains vacant. She said that she could not move into that vacant rental property because it would be a very lengthy commute in order to keep her daughter in the same school. At one point, she testified that the other property had a single tenant occupying the premises. Upon questioning from the male tenant who had viewed the other property, she agreed that it is in fact a two-unit residence. She

maintained that both of the rental units in that property are currently tenanted, the most recent one being rented as of October 2014.

The tenants questioned the landlord's good faith in maintaining that she needs the tenants' rental unit to downsize. They alleged that the landlord is an immigrant investor and has ample resources. They testified that the landlord has other rental properties and queried why she could not relocate to one of them. The tenants maintained that the landlord has been pursuing a very lengthy process to evict them for many different reasons over the past year. They claimed that the landlord does not intend to remain living in the tenants' rental unit, but plans to return to her present main floor location if the tenants are evicted. The tenants also testified that they are both encountering health problems, which would make it very difficult for them to move at this time.

Analysis – 10 Day Notice of February 6, 2015

The burden of proof regarding a notice to end tenancy rests with the landlord. In this case and on a balance of probabilities, I find that the tenants complied with the provisions of section 46(4) of the *Act* by paying the amount identified in the landlord's 10 Day Notice within five days of receiving that Notice. In this regard, I note that the landlord's 10 Day Notice was dated February 6, 2015, leaving the tenants five days to pay the rent owing. As the landlord could not provide a specific date when the tenants' January 2015 rent was paid, I find that the tenants' payment of rent in "early February" did comply with the requirements of the 10 Day Notice of February 6, 2015. For these reasons, I allow the tenants' application to cancel the 10 Day Notice.

Analysis – 2 Month Notice

Section 49(3) of the *Act* reads in part as follows:

> *(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.*

The tenants have questioned the extent to which the landlord's intentions are made in good faith. RTB Policy Guideline 2 describes the good faith requirement outlined in section 49(3) of the *Act* as "an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage." This Guideline also describes this good faith requirement in the following terms:

> *A claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy.*
>
> *If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.*
>
> *If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy…*

As noted above, much rests on the sincerity of the landlord in actually intending to move into the tenants' rental unit without a dishonest purpose.

At the hearing, the tenant confirmed that the landlord's current living area on the main floor is larger than the tenants' rental unit. The tenant did not dispute the landlord's claim that she would be able to rent the main floor of this property for a much higher monthly rental than the amount currently paid by the tenants. Although the tenant questioned the extent to which the landlord is truly experiencing financial hardship, he did not dispute the landlord's claim that she has monthly mortgage payments of $5,000.00 for one of her properties and $9,000.00 for another one. Without any other source of income, the landlord submitted written evidence and sworn testimony that she is having financial difficulties which caused her to list her other two rental properties for sale.

The tenants raised questions as to why the landlord could not relocate into one of her other two rental properties. I find that the landlord provided a reasonable explanation as to why it would be impractical for her to move to the most distant of these rental properties, which would require her to travel a long distance in order to enable her daughter to continue at the same school.

I find that the landlord's sworn testimony and evidence regarding the second of her rental properties in a neighbouring municipality (the second rental property) less convincing and consistent. The tenant maintained that the landlord advised him that this rental property remained vacant. The tenant raised questions regarding the landlord's own written evidence in which she stated at page 5 of her evidence package that she had "lost two properties rent income since last May." In that evidence, she stated that she had tried to sell these "two properties without tenants" since May 1st "and thought it would be sold quickly without tenants." At one point in the hearing, the landlord maintained that this second rental property had only one rental unit, a two-bedroom living unit occupied by a man named "G." The landlord said that she had rented it to G as of October 2014 for $2,000.00 per month. Later when questioned further by the tenant, the landlord changed her testimony to confirm his claim that there were actually two rental units in the property occupied by G. The landlord then testified that someone else was occupying the second rental unit in that building as well.

Based on the landlord's changing sworn testimony which also seems to be in conflict with her own written evidence, I have serious questions about the landlord's truthfulness regarding the circumstances surrounding this second rental property. The tenants have raised significant questions as to whether both living units in the landlord's second residential property are occupied. Even if one or both of these rental units in the second property are vacant, I find that the second property is in a different municipality and would clearly involve more travel for the landlord to keep her daughter attending the same school. If the landlord had another vacant rental unit nearby, the tenants' argument in this regard would have considerably more weight.

Given the distance between the landlord's other rental properties and her current residence, I find that the tenants' assertion that the landlord should relocate to other municipalities, of limited relevance to the issue before me. Rather, the test before me is one of assessing the extent to which the landlord truly intends to move into the tenants' rental unit and rent out the more lucrative main floor residence that she currently occupies. Based on the $2,350.00 monthly rent currently paid by the tenants, the tenants did not dispute the suitability of their basement suite for the landlord and her daughter. They did not dispute the landlord's claim that she could obtain significantly higher rent from prospective renters for the landlord's current main floor residence. Based on the evidence before me, I find that the solution

identified by the landlord to remove herself from her financial difficulties by relocating to the tenants' rental unit, appears to be reasonable and genuine under the circumstances.

The tenant alleged that the tenants should not be held responsible for poor investment decisions made by the landlord or her inability to properly maintain her real estate holdings. There is certainly an element of merit to the tenant's allegations in this regard. The landlord submitted written evidence outlining the losses she has incurred as a result of dispute resolution applications initiated by the tenants. Despite her admitted deficiencies as a real estate investor, the landlord provided undisputed evidence that she is undergoing financial problems, which she plans to alleviate through the sale of one or more of her other rental properties. Without the proceeds from these sales and without rental income from at least one of these other properties, the landlord provided undisputed sworn testimony that she is responsible for significant monthly mortgage payments. I find that the landlord has made a compelling case that she has a significant financial interest in relocating to the tenants' rental unit so as to obtain more than double the monthly rent from the overall property.

In considering the tenants' allegation that the landlord is not acting in good faith, I have also taken into account the multiple failed attempts the landlord has undertaken to end this tenancy. I have also taken into account the landlord's costs associated with complying with previous decisions issued by arbitrators in favour of the tenants. In this regard, I also note that the landlord has failed to abide by a repair order of the arbitrator who considered the tenants' application in August 2014. The most recent arbitrator issued a February 13, 2015 decision ordering the landlord to comply with the previous arbitrator's repair order and further ordered a $200.00 monthly rent reduction as of March 1, 2015, "until such time as the landlord has had all of the water damage in the 'wine room' wall remediated by a qualified contractor." In this most recent decision, the arbitrator also ordered additional repairs.

Since the landlord issued her 2 Month Notice on the same date that the most recent arbitrator issued his decision, I find it unlikely that the landlord would have been aware of this outcome at the time she issued her 2 Month Notice. Given that her previous 1 Month Notice to End Tenancy for Cause was dismissed by way of a February 11, 2015 decision, it is also very unlikely that the landlord would have received that decision by the time she issued her 2 Month Notice two days later. Without these decisions in her possession at the time of the landlord's issuance of the 2 Month Notice, I find insufficient evidence to demonstrate that the landlord's reason for issuing the 2 Month Notice was motivated by another purpose that outweighs what I find was her genuine increasing desperation to resolve her financial difficulties.

Based on a balance of probabilities, I find that the landlord has met the burden of proving that she does truly intend to move into the tenants' rental unit as stated on the 2 Month Notice. In coming to this determination, I recognize that the relationship between these parties has deteriorated to the extent that the landlord no doubt has additional motivation to seek an end to this tenancy. Despite some inconsistent testimony from the landlord regarding the availability of a vacant suite in her second rental property, I find that she does genuinely intend to vacate the main floor of this house and move into the tenants' rental unit. Although she admitted at the hearing that she has made poor financial decisions with her real estate holdings, this decision to relocate to the tenants' rental unit would seem to be a prudent way of maximizing her income to offset the losses she is experiencing while avoiding any disruption to her daughter's education. After carefully considering RTB Policy Guideline 2, I find that the other purposes that the landlord may also have in seeking an end to this tenancy do not negate her honesty of intent to actually move into the tenants' rental unit and rent out her current main floor accommodations.

I dismiss the tenants' application to cancel the 2 Month Notice. As the tenants have been primarily unsuccessful in this application, I find that they are not entitled to recover their filing fee from the landlords.

Section 55(1) of the *Act* reads as follows:

> ***55*** *(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,*
>
> *(a) the landlord makes an oral request for an order of possession, and*
>
> *(b) the director dismisses the tenant's application or upholds the landlord's notice.*

At the hearing, the landlord requested an Order of Possession if the tenants' application for cancellation of either of the Notices to End Tenancy were dismissed. In accordance with section 55(1) of the *Act*, I issue the landlord an Order of Possession as the tenants' application has been dismissed.

Conclusion

I allow the tenants' application to cancel the 10 Day Notice, which is of no continuing force or effect.

I dismiss the tenants' application to cancel the 2 Month Notice. The landlord is provided with a formal copy of an Order of Possession effective at 1:00 p.m. on April 15, 2015, a copy of which must be served on the tenants as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I dismiss the tenants' application for the recovery of their filing fee without leave to reapply. I dismiss the tenants' application for a monetary award and the return of their security deposit, with leave to reapply. The tenants are reminded that final and binding decisions made by previous arbitrators for monetary awards cannot be altered or overturned by submitting new applications for issues already decided.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: March 05, 2015

Residential Tenancy Branch